

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 03-M-2529

TIMOTHY OSBORN,

Plaintiff,

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
08/06/04
GREGORY C. LANGHAM,
CLERK

v.

JOANNE B. BARNHART, Commissioner of Social Security,

Defendant.

ORDER OF REVERSAL AND FOR REMAND

This is a judicial review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security terminating payment of disability insurance benefits to Timothy Osborn upon the determination that he was no longer disabled within the meaning of the Social Security Act on June 1, 2000. The award of benefits was made on October 23, 1991, for the onset of disability as of January 23, 1990. A periodic review resulted in continuation of disability payments on April 17, 1995.

The original disability determination for Mr. Osborn was made pursuant to an Administrative Law Judge's ("ALJ") findings that because of a probable herniated disc of the lumbar spine with decreased sensation and reflex in lower extremities and intermittent urinary incontinence identified by neurosurgical consultation on February 7, 1990, the claimant met the findings required for medical listing 1.05C at that time. R. 110-11. The determination of continuing disability in 1995 was on the same basis.

The decision under review was based on the findings and conclusions of another

ALJ from a hearing held on July 9, 2002. In his written decision, the ALJ concluded that the medical evidence establishes that the claimant has experienced significant improvement in his medical impairments since June 1, 2000, such that although he was unable to perform his past relevant work, he retained the residual functional capacity to make an adjustment to other work existing in significant numbers in the national economy, as an assembler, call out operator, charge account clerk and production solderer. The termination was under the statutory authority in 42 U.S.C. § 423(f)(1).

The ALJ's analysis of the medical record resulted in his finding that Mr. Osborn's impairments did not meet or equal the severity of any listing of impairments, considering amendments to the musculoskeletal listings as amended by regulations effective February 19, 2002. Specifically, the ALJ found that the claimant did not meet the criteria of medical listing 1.05C because there was no evidence of spasms, significant motor loss and weakness.

The ALJ erroneously concluded that because the claimant no longer met the requirements for that listing there was demonstrated medical improvement. In *Veino v. Barnhart*, 312 F.3d 578 (2nd Cir. 2002), the Second Circuit Court of Appeals expressly rejected the Commissioner's argument that the fact that the claimant once qualified for a particular impairment in the Listing of Impairments and was then found not to qualify for that listing proves medical improvement.

"Medical improvement" is a term of art under the Commissioner's regulations. It is defined in § 404.1594(b)(1) as follows:

(1) *Medical improvement.* Medical improvement is any decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable medical decision that you were disabled or

continued to be disabled. A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with your impairment(s) (see § 404.1528).

Under Section 405.1594(c)(1), the Commissioner directs that medical improvement must be determined by a comparison of prior and current medical evidence “which must show that there have been changes (improvement) in the symptoms, signs or laboratory findings associated with that impairment(s).” Subsection (c)(3)(i) recognizes that if a prior favorable decision was based on meeting the listing of impairments there would have been no assessment of residual functional capacity and, therefore, provides that if medical improvement has occurred and the severity of the prior impairments no longer meets or equals the same listing section, the medical improvement is deemed related to the ability to work but expressly says: “We must, of course, also establish that you can concurrently engage in gainful activity before finding that your disability has ended.”

In Mr. Osborn’s case, the ALJ indulged in the presumption that the claimant’s failure to meet the listing requirement in the year 2000 was the result of some medical improvement in his impairments. The following is the specific finding:

The claimant no longer meets the criteria of listing 1.05C. He may report pain and have symmetrical decreased deep tendon reflexes distally, but there is no evidence of spasms, significant motor loss and weakness. The claimant has experienced medical improvement. Counsel, in his closing argument submitted after the hearing, argues that MRI findings of slightly increased disc protrusion and an appearance that desiccation of L1-2 has progressed, precludes the finding of medical improvement. MRI findings may show some slight progression of the claimant’s back impairments but other objective findings, including the absence of spasms, significant motor loss and weakness, clearly show that the claimant no longer meets the criteria of the listing he met at the time of his most recent favorable decision. This is medical improvement.

While earlier medical records are in the file and the ALJ said that he gave careful consideration to all the evidence, he did not say how he compared the symptoms, signs and laboratory findings, in those earlier records with the later reports. Thus, his statement is not entirely credible. Indeed, the quoted paragraph shows a progression of the back impairments shown by MRI findings. The ALJ noted that the Veteran's Administration had found Mr. Osborn disabled as a result of service-connected disabilities in December, 1997, and commented that this conclusion was not dispositive. He did not explain why it was given no consideration as support for the claimant's continuing disability. The reports and opinions of Dr. Barkow, Dr. Miller and Dr. Shebowich together with MRI objective findings provide ample evidence that Mr. Osborn continues to suffer severe chronic pain and that it results from objective evidence of progressive impairments in his back.

The ALJ's analysis was improper under the law and the decision therefore must be reversed for legal error.

Additionally, counsel for the plaintiff attached copies of a report of an MRI done on January 13, 2004, and a Residual Functional Capacity Evaluation done at the University of Colorado Hospital on March 3, 2004, to her brief. The Commissioner rejected a suggestion of a remand for consideration of this new evidence for the stated reason that such evidence is irrelevant to the period at issue, ending June 1, 2000. The question of relevance of new medical reports is not a matter of a lawyer's objection under the Federal Rules of Evidence; it is rather a medical question and because the medical evidence in the administrative record is consistent with increasing pain resulting from a progression of the back impairments, the new reports appear to be some

evidence of a deteriorating rather than improving medical condition in the relevant time period contrary to the ALJ's view. Therefore, the newly submitted evidence warrants remand for consideration of it, which may require medical consultation.

Because the decision terminating benefits resulted from legal error and therefore must be reversed, it is not necessary to consider the plaintiff's challenges to the residual functional capacity findings in the ALJ's decision.

Upon the foregoing, it is

ORDERED that the decision is reversed and this matter is remanded for a new evaluation of disability.

DATED: August 6, 2004.

BY THE COURT:

Richard P. Matsch, Senior District Judge